BEFORE THE
FEDERAL MARITIME COMMISSION

Docket No. 16-01

CARGO AGENTS, INC., INTERNATIONAL TRANSPORT MANAGEMENT CORP., and RCL AGENCIES, INC., on behalf of themselves and all others similarly situated,

Complainants,

v.

NIPPON YUSEN KABUSHIKI KAISHA, NYK LINE (NORTH AMERICA) INC., MITSUI O.S.K. LINES, LTD., MITSUI O.S.K. BULK SHIPPING (USA) INC, WORLD LOGISTICS SERVICE (U.S.A.) INC., KAWASAKI KISEN KAISHA, LTD., "K" LINE AMERICA, INC., EUKOR CAR CARRIERS INC., WALLENIUS WILHELMSEN LOGISTICS AS, WALLENIUS WILHELMSEN LOGISTICS AMERICAS LLC, COMPAÑÍA SUD AMERICANA DE VAPORES S.A., CSAV AGENCY NORTH AMERICA, LLC, HÖEGH AUTOLINERS HOLDINGS AS, HÖEGH AUTOLINERS AS, HÖEGH AUTOLINERS, INC., AUTOTRANS AS, ALLIANCE NAVIGATION LLC, and NISSAN MOTOR CAR CARRIER CO., LTD.

Respondents.

RESPONDENTS' CONSOLIDATED REPLY TO COMPLAINANTS' OPPOSITION TO THE CONSOLIDATED MOTION TO STAY PROCEEDINGS

BALLARD SPAHR LLP
HOGAN LOVELLS US LLP
SAUL EWING LLP
Attorneys for the Specially Appearing WWL/EUKOR Respondents

BAKER & HOSTETLER LLP
Attorneys for the Specially Appearing NYK Respondents

CLEARY GOTTLIEB STEEN & HAMILTON LLP
Attorneys for the "K" Line Respondents

WILMER, CUTLER, PICKERING, HALE & DORR LLP
Attorneys for the Specially Appearing CSAV Respondents

COZEN O'CONNOR PC
Attorneys for the Specially Appearing Höegh Respondents

ARNOLD & PORTER LLP
NIXON PEABODY LLP
Attorneys for the MOL Respondents

Specially Appearing Respondents Nippon Yusen Kabushiki Kaisha and NYK Line (North America) Inc. (collectively, "NYK"), EUKOR Car Carriers Inc. ("EUKOR"), Wallenius Wilhelmsen Logistics AS and Wallenius Wilhelmsen Logistics Americas LLC, (collectively, "WWL"), Compañía Sud Americana de Vapores S.A. and CSAV Agency North America, LLC (collectively, "CSAV"), Höegh Autoliners Holdings AS, Höegh Autoliners AS, Höegh Autoliners, Inc., Autotrans AS and Alliance Navigation LLC (collectively, "Höegh"),[1] by and through their respective undersigned counsel, respectfully reply to the opposition to the motion for the entry of an order staying proceedings in the above captioned case. Respondents Mitsui O.S.K. Lines, Ltd., Mitsui O.S.K. Bulk Shipping (USA) Inc., World Logistics Service (U.S.A.) Inc. and Nissan Motor Car Carrier Co., Ltd. (collectively "MOL") and Kawasaki Kisen Kaisha, Ltd., and "K" Line America, Inc. (collectively, "'K' Line"), through counsel, have entered a general appearance, and also join in this reply. In support thereof, Specially Appearing Respondents, MOL, and "K" Line (collectively, "Respondents") respectfully represent as follows:

I. BACKGROUND.

By an order dated February 3, 2016 ("the Feb. 3, 2016 order"), the Presiding Officer granted the request of Complainants that they be allowed until February 16, 2016 to respond to Respondents' Consolidated Motion to Stay Proceedings. That same order authorized a reply by Respondents, to be filed by March 1, 2016. The order also required that the parties address the factors relevant to the motion for a stay, and whether and at what time the Presiding Officer should address whether the Commission has the statutory authority to entertain a class action.

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[1] NYK, EUKOR, WWL, CSAV and Höegh collectively are referred to as the Specially Appearing Respondents.

On February 16, 2016, Complainants filed their opposition to Respondents' Consolidated Motion to Stay Proceedings. This reply follows.

II. ARGUMENT.

A. The stay should be granted.

Complainants allege that they are direct purchasers of Vehicle Carrier Services, as defined in the Complaint. They instituted first-filed actions in the United States District Court for the District of New Jersey ("the District Court") purporting to state claims against Respondents under the federal antitrust laws for the "same misconduct" they allege here. [Opp. at 1]. In *General Motors LLC v. Nippon Yusen Kabushiki Kaisha, et al.*, ___ S.R.R. ___, 2016 WL 232546 (Fed. Mar. Comm'n Dkt. No. 15-08, A.L.J. Order, Jan. 5, 2016), the Presiding Officer analyzed with care all of the factors relevant to determining whether a stay was appropriate in favor of a first-filed action and, faced with mirror-image facts, concluded that a stay was appropriate. *Id.* at 3. Complainants dismiss the import of *General Motors,* claiming that it has "no binding, or even persuasive, effect on these proceedings" (1) because the civil antitrust action General Motors filed in the District Court is still pending -- unlike complainants' dismissed-but-on-appeal Sherman Act claims -- and (2) because the stay in *General Motors* was granted pursuant to a joint motion. [Opp. at 6-7]. Complainants are incorrect in both instances.

Neither "reason" warrants the conclusion that *General Motors* either is inapplicable or has "no persuasive effect" here. Although Complainants' District Court complaint has been dismissed, Complainants continue to press those claims: they filed an appeal to the United States Court of Appeals for the Third Circuit, an appeal that -- seeking to have their cake and eat it too -- Complainants have neither abandoned nor withdrawn. In those

circumstances, the first-filed rule squarely applies, particularly where the first-filed case is on appeal and the plaintiffs -- here Complainants -- continue to avail themselves of the fair process of the forum they initially chose. *See Bacardi Int'l Ltd. v. V. Suarez & Co.*, 719 F.3d 1 (1st Cir. 2013); *Rogers v. Desiderio*, 58 F.3d 299 (7th Cir. 1995). And, although the stay in *General Motors* was sought by joint motion, it was not the result of a rubber stamp: the Presiding Officer analyzed each of the relevant factors and concluded that, on the whole, a stay was appropriate. That analysis equally is applicable and persuasive here.

Despite Complainants' attempt to differentiate themselves, an objective review of the relevant factors -- and Complainants' objections thereto -- lead to the conclusion that the stay should be granted.

1. *The first-filed court/status of the district court litigation.* Complainants assert that the first-filed rule is inapplicable because the District Court dismissed their federal antitrust claims. [Opp. at 8]. They ignore, however, that they filed an appeal and are pursuing their claims in the Third Circuit. [Consl. Mot. Exh. "C"]. In those circumstances, all of the sound policy reasons that animate the first-filed rule are present and remain compelling in respect of Complainants' first-filed action in the District Court.[2]

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[2] Complainants misstate that their appeal has been "indefinitely" stayed pending other proceedings in the District Court that involve different plaintiffs. [Opp. at 7-8]. That is incorrect, as the Third Circuit stay is not indefinite: by its express terms, it will "automatically expire upon entry of the order disposing of the last post-decision motion[,]" [Consol. Mot. Exh. "G"], which has been fully briefed and is pending decision. Also, Complainants' assertion that their District Court matter involves different plaintiffs also is incorrect: two of the named plaintiffs in this case also are named plaintiffs in the District Court case, and the remaining Complainant here plainly is a member of the putative class the named plaintiffs in the District Court case purport to represent. *See* Consol. Mot. Exh. "A".

2. *The convenience of the forum*. Complainants do not dispute that several Respondents maintain offices either in the District of New Jersey or New York, that two Complainants are headquartered in New Jersey, and that the third Complainant is headquartered in New York. They assert instead that "given the nature of their business, Respondents undoubtedly have frequent contact with the Commission." [Opp. at 8]. The "frequent contact" to which Complainants refer is not relevant to a stay motion and ultimately does nothing to alter the fact that all, or almost all, of the offices, documents, other evidence and witnesses germane to this dispute are in New Jersey or New York, and none is in the District of Columbia. In *General Motors*, the Presiding Officer concluded that this factor weighed in favor of granting a stay in that case; that reasoning applies with equal force here.

3. *The desirability of avoiding piecemeal litigation*. In an odd twist of logic, Complainants argue that the District Court's dismissal of their claims, coupled with the stay by the Third Circuit, means that there is no duplicative litigation. [Opp. at 8]. That, too, is wrong. Complainants have appealed that dismissal and, absent a stay here, the parties simultaneously will be litigating before the District Court, the Third Circuit, and the Commission; that, quintessentially, is duplicative litigation. Complainants argue that there is no duplicative litigation because their purported Shipping Act claims are "distinct" from their federal antitrust claims and, according to Complainants, they may maintain both types of claims. [Opp. at 7]. That argument is premised on a fundamental misunderstanding of what constitutes duplicative litigation under the first-filed rule. The first-filed rule does not require identical claims, but only that the two actions contain overlapping issues and parties. *Hutt v. Erbey*, No. 15-cv-891, 2015 WL 8780547 at *7, n.17 (N.D. Ga. Dec. 14, 2015). The

test is whether "both actions rest on the same or closely related transactions, happenings or events, and thus will call for the determination of the same or substantially related questions of fact." *In re Groupon Derivative Litigation*, 882 F. Supp. 2d 1043, 1050 (N.D. Ill. 2012). The inquiry is whether "the overall content of each suit is not very capable of independent development and will be likely to overlap to a substantial degree." *Wolf Designs, Inc. v. Donald McEvoy, Ltd., Inc.*, 341 F. Supp. 2d 639, 643 (N.D. Tex. 2004). Where, as here, Complainants admit that their Shipping Act claims and their federal antitrust claims are based on the "same misconduct", [Opp. at 1], there is a complete overlap of parties, transactions, happenings, events, and fact question between the two sets of claims. The two cases -- the complaints Complainants filed in the District Court and before the Commission -- are paradigmatic examples of duplicative litigation.

4. and 5. *The law providing the rule of decision and the adequacy of the forum to protect the parties' rights*. Complainants assert that there is no dispute as to the applicability of the Shipping Act to their claims. [Opp. at 8]. That assertion cannot be correct: Complainants themselves dispute the applicability of the Shipping Act to at least some of their claims. As the District Court noted, Complainants "contend that agreements to restrict capacity are not prohibited by the Shipping Act and are therefore subject to private antitrust suits." [Consol. Mot. Exh. "B" at 7]. Although those assertions have been rejected by the District Court, Complainants continue to prosecute those claims, albeit now before the Third Circuit.

Complainants further assert that the Commission is the only tribunal empowered to hear and decide Shipping Act claims, and it is the appropriate forum to protect all parties' rights on the merits of their claims. [Opp. at 7]. Whether Complainants have

federal antitrust claims or Shipping Act claims remains unresolved. What is clear is that Complainants cannot have it both ways: the Shipping Act, by its explicit terms, precludes the maintenance of private federal antitrust claims based on conduct prohibited by the Shipping Act. 46 *U.S.C.* § 40307(d). As the Presiding Officer emphasized in *General Motors*, "only one of the cases will proceed; nothing is gained, and much is lost, by having the two cases proceed simultaneously." *General Motors, supra*, at 3.[3]

6. *Whether one of the actions is vexatious or reactive*. Complainants assert that neither their Sherman Act claims in the District Court nor their Shipping Act claims before the Commission are vexatious. [Opp. at 9]. That said, they cannot avoid the inevitable: even if not vexatious, this action certainly is reactive. Complainants initially filed their District Court actions in August 2013 and October 2013, only to wait more than two years to file this action, and then only because their federal antitrust claims were dismissed.

7. *Whether the parties or the public interest will be harmed by a stay*. Complainants do not address whether the public interest will be harmed by a stay. In *General Motors*, the Presiding Officer determined that the public interest would benefit from a stay because the time and resources of the District Court and the Commission would not be consumed by duplicative litigation. *General Motors, supra*, at 3. The same holds true here.

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[3] Complainants' reliance on *Bimsha Int'l v. Chief Cargo Servs., Inc.*, No. 10-08, 2011 WL 7144011, 32 SRR 353 (ALJ Dec. 14, 2011), is misplaced. In *Bimsha*, the Presiding Officer did not say -- as Complainants inaccurately suggest, Opp. at 7 -- that the complainants in that case simultaneously could pursue claims before the Commission and before the courts. Rather, the Presiding Officer concluded that Shipping Act jurisdiction was not displaced by recourse to claims under the Webb-Pomerene Act of 1918, 46 U.S.C. §§ 80101-80116, the latter of which those complainants did not file.

8. *The Commission's interest in resolving controversies efficiently*.

Complainants argue that the Commission's interest in resolving disputes in an efficient manner is demonstrated by its order targeting a final decision on the merits of this matter by July 1, 2017. [Opp. at 9]. That reasoning conflates speed with efficiency. It is inefficient for the Commission to go forward until the nature of Complainants' claims -- that is, whether Complainants' claims are cognizable under either federal antitrust laws or the Shipping Act -- and the appropriate forum for adjudicating those claims -- the District Court or this Commission -- are decided by the Third Circuit.[4] More to the point, a like scheduling order was issued in *General Motors*, and it was no impediment to the stay being granted.

9. *The stage of the litigation*. Complainants argue that there is nothing pending in the District Court because the District Court dismissed their federal antitrust claims. [Opp. at 9]. Complainants ignore, however, that they have filed an appeal from the District Court's decision, and are pursuing their claims before the Third Circuit; the proceedings in the first-filed action are much farther advanced than the status of this action.

10. *Whether the non-moving parties will be unduly prejudiced or tactically disadvantaged by a stay*. Complainants contend that they will be disadvantaged by a stay (a) because there has been minimal discovery in the District Court, and (b) because, they speculate, evidence "may" be lost and testimony "may" no longer be available. [Opp. at 9]. Neither concern is relevant here. The amount of discovery exchanged in the District Court

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[4] Although Complainants have not stated their intentions explicitly, it is consistent with Complainants' actions to date that, if their appeal to the Third Circuit results in the reinstatement of their District Court complaint, they likely will abandon this action before the Commission. If so, any time spent on this matter -- by both the Commission and the parties -- will have been for naught.

bears no relation to whether Complainants will be prejudiced or disadvantaged; it is simply one of many gauges by which to measure a case's progress. Likewise, Complainants well know that their boogeyman -- that documentary evidence may be lost -- is utterly unfounded: all of the Respondents have produced voluminous documents and records to the Department of Justice, and those documents and records are not going to be lost. Furthermore, Complainants identified not a single witness whose testimony they claim may be lost. And, Complainants' complaint that only minimal discovery has been undertaken in the District Court is an event of their own choosing.[5] Complainants -- and Complainants alone -- are responsible for any delay in discovery.

11. *Whether a stay will simplify issues*. Complainants contend that a stay will not simplify issues because their Third Circuit appeal "will only resolve procedural matters" and "not substantive merits-related matters." [Opp. at 10]. This is transparently wrong; the Third Circuit's decision on Complainants' appeal will narrow the issues considerably. Of necessity, the Third Circuit must decide this matter's core substantive issue: whether the Shipping Act or the federal antitrust laws are available for redress of Complainants' putative claims and, thus, what is the appropriate forum for adjudicating those claims. Certainly, staying this matter until the Third Circuit makes those determinations will simplify the issues.

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[5] In the District Court, Complainants voluntarily chose to enter into stipulations that they would not seek or serve discovery until the earlier of May 1, 2015 or the District Court's decision on the motion to dismiss. *See, e.g., In re Vehicle Carrier Servs. Antitrust Litig.*, Case No. 2:13-cv-03306, Dkt. Nos. 113 (Toyofuji Stipulation ¶ 3), 114 (CSAV Stipulation ¶ 3), 115 (MOL Stipulation ¶ 3), 116 (NYK Stipulation ¶ 3), 117 (K Line Stipulation ¶ 3). When May 1, 2015 arrived, Complainants did nothing up to and including August 28, 2015, when the District Court dismissed their federal antitrust claims. Even then, Complainants waited an additional four months to institute this action.

B. Whether the Commission has the statutory authority to entertain a class action with the power to bind members of the class who were not parties in a private party complaint proceeding need not be addressed at this time.

In the Feb. 3, 2016 order, the Presiding Officer questioned "whether the Commission has the statutory authority to entertain a class action with the power to bind members of the class who were not parties in a private party complaint proceeding[,]" and directed the parties -- Complainants in their opposition and Respondents in a reply -- "whether this question should be resolved prior to, concurrently with, or after ruling on the motion to stay." Feb. 3, 2016 order at 2.

Respondents respectfully submit that, at this time, the Presiding Officer need only decide whether a stay is appropriate and need not, for present purposes, address the further-reaching legal issue of the statutory availability of class actions before the Commission. When ripe -- that is, after the District Court matter truly is at an end and Complainants are ready, willing, and able to prosecute this action exclusively, and after all preliminary motions testing the legal sufficiency or sustainability of the complaint or the like have been adjudicated in this action -- the legal issues pertaining to "whether the Commission has the statutory authority to entertain a class action with the power to bind members of the class who were not parties in a private party complaint" should be scheduled for briefing and determination, if necessary.[6] Respondents respectfully submit that, until then, it is premature to address those questions.

[6] Respondents reserve the right to address the class action issue simultaneously with any such preliminary motions or at any other timely juncture, as appropriate under the circumstances.

III. CONCLUSION.

For the foregoing authority, arguments and reasons, Respondents respectfully request that (a) their consolidated motion for a stay of proceedings be granted pending a resolution of Complainants' appeal to the U.S. Court of Appeals for the Third Circuit; (b) an appropriate order be entered staying this action, and all associated proceedings and deadlines, pending a further order from the Presiding Officer; (c) the parties be commanded to file, every 90 days, a written status report updating the Presiding Officer on the District Court/Third Circuit proceedings; and (d) granting such other and further relief as the Presiding Officer may deem just and proper.

DATED: March 1, 2016

Respectfully submitted,

Roberto A. Rivera-Soto
Stephen J. Kastenberg
Jason A. Leckerman
BALLARD SPAHR LLP
210 Lake Drive East – Suite 200
Cherry Hill, New Jersey 08002-1163
Telephone: (856) 761-3400
riverasotor@ballardspahr.com
kastenberg@ballardspahr.com
leckermanj@ballardspahr.com

Benjamin F. Holt
HOGAN LOVELLS US LLP
Columbia Square
555 Thirteenth St., N.W.
Washington, D.C. 20004
Telephone: (202) 637-5600
benjamin.holt@hoganlovells.com

Paul Heylman
Matthew J. Antonelli
SAUL EWING LLP
1919 Pennsylvania Avenue, N.W., Suite 550
Washington, D.C. 20006
Telephone: (202) 342-3422
pheylman@saul.com

mantonelli@saul.com

Counsel for Specially Appearing Respondents Wallenius Wilhelmsen Logistics AS, Wallenius Wilhelmsen Logistics America LLC, and EUKOR Car Carriers, Inc.

John R. Fornaciari /rrs

John R. Fornaciari
Robert M. Disch
BAKER & HOSTETLER LLP
1050 Connecticut Ave., NW
Suite 1100
Washington, D.C. 20036
Telephone: 202-861-1612
jfornaciari@bakerlaw.com
rdisch@bakerlaw.com

Counsel for Specially Appearing Respondents Nippon Yusen Kabushiki Kaisha and NYK Line North America Inc.

Jeffrey F. Lawrence /rrs

Jeffrey F. Lawrence
Melissa H. Maxman
Wayne Rohde
COZEN O'CONNOR PC
1200 Nineteenth St., NW
Washington, D.C. 20036
Telephone: 202-912-4800
jlawrence@cozen.com
mmaxman@cozen.com
wrohde@cozen.com

Counsel for Specially Appearing Respondents Höegh Autoliners AS and Höegh Autoliners, Inc.

Mark W. Nelson /rrs

Mark W. Nelson
Jeremy Calsyn
CLEARY GOTTLIEB STEEN & HAMILTON LLP
2000 Pennsylvania Avenue, NW

Washington, D.C. 20006
Telephone: 202-974-1500
mnelson@cgsh.com
jcalsyn@cgsh.com

Counsel for Respondents
Kawasaki Kisen Kaisha, Ltd. and
"K" Line America, Inc.

James L. Cooper/ms

James L. Cooper
Anne P. Davis
Adam M. Pergament
ARNOLD & PORTER LLP
601 Massachusetts Avenue, N.W.
Washington, D.C. 20001
Telephone: (202) 942-5000
james.cooper@aporter.com
anne.davis@aporter.com
adam.pergament@aporter.com

Eric C. Jeffrey
Robert B. Yoshitomi
NIXON PEABODY LLP
799 Ninth Street, NW – Suite 500
Washington, D.C. 20001-4501

Counsel for Respondents
Mitsui O.S.K. Lines, Ltd., Mitsui O.S.K. Bulk Shipping (U.S.A.), Inc., World Logistics Service (U.S.A.) Inc., and Nissan Motor Car Carrier Co., Ltd.

Steven F. Cherry/ms

Steven F. Cherry
Todd F. Braunstein
WILMER, CUTLER, PICKERING, HALE & DORR LLP
1875 Pennsylvania Avenue, NW
Washington, D.C. 20006
Telephone: (202) 663-6000
Steven.Cherry@wilmerhale.com
Todd.Braunstein@wilmerhale.com

Counsel for Specially Appearing Respondents
Compañia Sud Americana de Vapores, S.A. and
CSAV Agency, LLC

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 1st day of March, 2016, a true and correct copy of the foregoing Reply to the Opposition to the Consolidated Motion for a Stay of Proceedings was served, via electronic mail and via first-class mail, postage prepaid, on:

Edward D. Greenberg
David K. Monroe
GKG LAW, P.C.
The Foundry
1055 Thomas Jefferson Street, NW – Suite 500
Washington, DC 20007-4492
egreenberg@gkglaw.com
dmonroe@gkglaw.com

Kit A. Pierson
David A. Young
COHEN MILSTEIN SELLERS & TOLL PLLC
110 New York Ave., NW – Suite 500
Washington, DC 20005
kpierson@cohenmilstein.com
dyoung@cohenmilstein.com

Robert N. Kaplan
Richard J. Kilsheimer
Gregory K. Arenson
Joshua H. Salltzman
KAPLAN FOX & KILSHEIMER LLP
850 Third Ave. – 14th Floor
New York, NY 10022
rkaplan@kaplanfox.com
rkilsheimer@kaplanfox.com
garenson@kaplanfox.com
jsaltzman@kaplanfox.com

Lewis H. Goldfarb
McELROY, REUTSCH, MULVANEY & CARPENTER, LLP
1300 Mout Kimble Avenue
P.O. Box 2075
Morristown, NJ 07962
lgoldfarb@mdmc-law.com

Steven A. Kanner
Michael J. Freed

Michael E. Moskovitz
FREED KANNER LONDON & MILLEN LLC
2201 Waukegan Road – Suite 130
Bannockburn, IL 60015
skanner@kaplanfox.com
mfreed@kaplanfox.com
mmoskovita@kaplanfox.com

Solomon B. Cera
C. Andrew Dirksen
CERA LLP
595 Market Street – Suite 2300
San Francisco, CA 94105
scera@cerallp.com
cdirksen@cerallp.com

Counsel for Complainants

Paul M. Heylman
SAUL EWING LLP